TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903. 1903

No. 422. 407

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE ST. ANTHONY RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED [illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 479.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE ST. ANTHONY RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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A

No. 731.

In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,
vs.
THE ST. ANTHONY RAILROAD COMPANY.

TRANSCRIPT OF RECORD.

Error to the United States circuit court for the district of Idaho, southern division.

1 In the circuit court of the United States within and for the district of Idaho, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Complaint.

The United States of America, by R. V. Cozier, its attorney for the district of Idaho, complains of the St. Anthony Railroad Company, a corporation, the defendant above named, for that during all the times hereinafter mentioned the plaintiff was, and now is, the owner and in the possession of the following-described lands situated in said district of Idaho, to wit:

Which will be, when surveyed, townships nine (9), ranges 42, 43, and 44 E. B. M.; townships eighteen (18), ranges 41, 42, 43, and 44, all in Fremont County, Idaho; and townships 2 and 3 N., R. 42 E. B. M., in Bingham County, Idaho, Blackfoot land district.

And for that during the summer and fall of the year 1899 the defendant, being now, and being then, a corporation organized and existing under and by virtue of the laws of the State of Idaho and carrying on a railroad business in said State, unlawfully entered upon said lands, through its authorized representatives, and felled and cut down timber and trees then and there growing and being upon the lands aforesaid, and wilfully took and carried away of the trees and timber so felled and cut, and belonging to the plaintiff, and converted to its, the said
2 defendants, own use 1,702,000 feet thereof, then and there of the value of $12.35 per 1,000 feet, or $21,019.70 in all.

And for that during all the times hereinafter mentioned the plaintiff was, and now is, the owner and in the possession of the following-described lands situated in the district of Idaho, to wit, which will be when surveyed townships nine (9), ranges 42, 43, and 44 E. B. M.; townships eighteen (18), ranges 41, 42, 43, and 44, all in Fremont County, Idaho; and townships 2 and 3 N., R. 42 E. B. M., in Bingham County, Idaho, Blackfoot land district.

And for that during the summer and fall of the year 1899 the defendant, being then, and now, a corporation organized and existing under and by virtue of the laws of Idaho, engaged in conducting a general railroad

business in said State, through its authorized representatives, unlawfully entered upon said lands and felled and cut down timber and trees then growing and being upon said lands aforesaid, and wilfully took and carried away of the trees and timber so felled and cut, and then the property of the plaintiff, and converted to its, the said corporation aforesaid, own use 225,000 feet of by-product of lumber manufactured therefrom, then and there of the value of $2.00 per 1,000 feet, or $450.00 in all.

Wherefore, the said United States demands judgment against the said defendant, the St. Anthony Railroad Company, in the sum of $21,469.70, with legal interest from date of conversion, and costs of suit.

R. V. COZIER,
United States Attorney for Idaho, and Attorney for Plaintiff.

3 UNITED STATES OF AMERICA,
District of Idaho, ss:

R. V. Cozier, being duly sworn, says that he is United States district attorney for Idaho and attorney for plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated upon his information and belief, and as to those matters he believes it to be true.

R. V. COZIER.

Subscribed and sworn to before me this 21st day of August, A. D. 1900.

[SEAL.]

A. L. RICHARDSON,
Clerk U. S. Circuit Court.
By M. COZIER, *Deputy.*

(Endorsed:) No. 63. In the circuit court of the United States within and for the district of Idaho, southern division. United States of America, plaintiff, vs. St. Anthony Railroad Company, defendant. Complaint. Filed August 24th, 1900. A. L. Richardson, clerk. R. V. Cozier, United States attorney for Idaho and attorney for plaintiff.

In the circuit court of the United States for the district of Idaho, southern division.

UNITED STATES OF AMERICA
vs.
ST. ANTHONY RAILROAD COMPANY.

4 *Summons.*

The President of the United States to St. Anthony Railroad Company, the above-named defendant, greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Pocatello, in said district, and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this summons upon you, if served within the county of Bannock, in said district, or if served within any other county of said

district, then within forty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will take judgment against you for the sum of $21,469.70, together with legal interest and costs of suit. This suit is brought upon the ground that you, said defendant, entered upon certain lands of plaintiff situated in Fremont County, Idaho, unlawfully and felled and converted to your own use timber trees to the value aforesaid. The facts more fully appearing in plaintiff's complaint, a certified copy of which is hereto annexed and made a part hereof.

And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, affixed at Boise City, in said district, this 24th day of August, 1900.

[SEAL.] A. L. RICHARDSON, *Clerk.*

5 (Endorsed:) No. 63. In the circuit court of the United States for the district of Idaho, southern division. United States of America vs. St. Anthony Railroad Company. Summons. Returned and filed January 22d, 1901. A. L. Richardson, clerk.

In the circuit court of the United States within and for the district of Idaho, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Answer.

Comes now the defendant and answers the plaintiff's complaint, as follows, to wit:

(1)

It admits the incorporation of the defendant and the ownership of the lands described in the complaint, substantially as therein alleged.

(2)

Defendant denies that during the summer or fall of the year 1899, or at any other time, it unlawfully entered upon the lands mentioned in the complaint or upon any part thereof, through its authorized representatives, or otherwise or at all, or unlawfully felled or cut down any timber or trees then growing or being thereon, or wilfully took or carried away any of the said alleged trees or timber, or any trees or tim-

6 ber, or wilfully converted to the defendant's use 1,702,000 feet or 225,000 feet thereof, or any amount at all, and denies that defendant cut or felled or caused to be cut or felled, or appropriated, or converted to its use any trees or timber of any amount or value, except as hereinafter expressly admitted.

For a further and affirmative defense defendant avers:

(1)

That the defendant was, on or about May 18th, 1899, duly incorporated under and pursuant to the laws of the State of Idaho, for the purpose of constructing, owning, maintaining, and operating a steam railroad, extending from the town of Idaho Falls in Bingham County, Idaho, to St. Anthony in Fremont County in said State, a distance of approximately forty miles.

(2)

That on or about July 7th, 1899, the board of directors of the defendant company adopted as the route for said railway the line then surveyed and located by the defendant's engineer and shown upon the maps then presented, which line or right of way is the same as that upon which defendant's said railroad was afterwards actually built and upon which the same is now actually maintained and operated and is practically a straight line between said town of Idaho Falls and said town of S Anthony. That said right of way so surveyed, adopted, occupied, and used, passed and passes through and over public lands of the United States, and on or about July 7th, 1899, defendant caused to be filed in the local land office at Blackfoot, Idaho, a copy of its articles of incorporation, and due proofs of its organization under the same; also
7 maps of said right of way, together with certificates and affidavits in due form as required by law and the rules and regulations of the General Land Office, all of which papers and maps were thereafter forwarded to and filed with the Secretary of the Interior at Washington, D. C., on or about July 19th, 1899, and by him approved October 4th, 1899, and that defendant fully and duly performed all things required of railroad companies by the act of Congress granting to railroads the right of way through the public lands of the United States, approved March 3d, 1875, and thereby became entitled to the benefits and privileges therein granted to railroad companies.

(3)

And defendant avers that for the purpose of procuring the necessary material with which to construct its said railroad from Idaho Falls to St. Anthony, defendant entered into a contract with the Thompson Mercantile Company, a corporation, of St. Anthony, Idaho, by the terms and conditions of which the said Thompson Mercantile Company was to furnish to defendant at the times and in the manner therein agreed upon, and for the consideration therein named, ties and timbers of dimensions suitable for the construction of said railroad and as specified in said contract. That said ties and timbers were to be used and were used solely for the purpose of the original construction of said railroad, and said Thompson Mercantile Company was by the express terms of said contract appointed as the agent of the defendant, and in that capacity was authorized to cut timber for said and no other purpose upon and to take the same from the public lands of the United States adjacent to the line of said railroad.

8 (4)

That, as defendant is informed and believes and therefore avers, pursuant to the terms of said contract and acting as the agent of defendant, said Thompson Mercantile Company did enter upon the lands described in the complaint, the same being adjacent to the line of said railroad, for the purpose of procuring said ties and timbers, and did during the summer and fall of 1899 cut and remove of the trees and timber growing upon said lands not to exceed 1,682,975 feet thereof, and did deliver the same to this defendant along the line of its said road, to be, and the same were used in the original construction of said road. Said ties and timber were cut from the nearest timber-bearing public lands to said line of road, and as defendant is informed and believes and therefore avers, said lands were and are adjacent to said line of road. That all of said ties and timbers were necessary for the original construction of said road and were used for said purpose, and this defendant entered upon said lands, through its said agent, and cut and removed said timber and trees in good faith, with no intention of violating any law, or committing any tresspass but verily believing that it had the right so to do, and if in any of said acts it has done any wrong, the same was not wilful or intentional, but was due to inadvertence and mistake. That, as defendant is informed and believes, and therefore alleges, said timber as it stood upon said lands when defendant caused the same to be cut, was not of a value to exceed one dollar per thousand feet nor were said ties and timbers worth to exceed said amount per thousand feet at the time this suit was
9 commenced, after deducting defendant's reasonable expenses in causing said ties and timbers to be cut, sawed, and deliverd to and upon it said line of road.

Wherefore defendant prays that plaintiff take nothing and defendant recover its costs.

P. L. WILLIAMS,
F. S. DETRICH,
Attorneys for defendant.

STATE OF IDAHO,
County of Bannock, ss.:

E. C. Manson, being first duly sworn, says that he is one of the directors of the defendant corporation, and makes this verification upon its behalf; that he has read the foregoing answer and known the contents thereof, and the same is true of his own knowledge except as to matters therein stated to be upon information or belief, and as to those matters he believes it to be true.

E. C. MANSON.

Subscribed and sworn to before me this 12 day of November, 1900.

[SEAL.] THOS. F. TERRELL,
Notary Public.

(Endorsed:) No. 63. In the circuit court of the United States, district of Idaho. United States vs. St. Anthony Railroad Company. Answer. Filed November 13, 1900, at 2.25 p. m. A. L. Richardson, clerk. By Theo. Turner, deputy.

10 In the circuit court of the United States within and for the district of Idaho, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Demurrer to answer.

Comes now the plaintiff and demurs to defendant's answer, on file herein, for the reason that said answer does not state facts sufficient to constitute a defense to plaintiff's cause of action as set forth in plaintiff's complaint, on file herein.

R. V. COZIER,
Attorney for Plaintiff.

I, R. V. Cozier, attorney for plaintiff in the above entitled action, do hereby certify that, in my opinion, plaintiff's demurrer to defendant's answer, on file herein, is well founded in point of law.

R. V. COZIER.

(Endorsed:) No. 63. In the circuit court of the United States within and for the district of Idaho, southern division. United States of America, Plaintiff vs. St. Anthony Railroad Company, a corporation, defendant. Demurrer to answer. Filed November 24th, 1900. A. L. Richardson, clerk. R. V. Cozier, attorney for plaintiff.

11 In the circuit court of the United States within and for the district of Idaho, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Agreed statement of facts.

It is agreed that the facts involved in this case are as follows, to wit:

1. The allegations contained in the plaintiff's complaint, not denied in the defendant's answer, are true.

2. That the amount of timber and lumber cut or taken by defendant is correctly stated in the answer, and that lands upon which the same was cut are correctly described in the complaint, and said lands were and are unoccupied, unentered public lands of the United States; that said timber or lumber was cut and carried away at the times stated in the complaint, and its value, upon delivery to defendant, was as alleged in the complaint.

3. That paragraphs one, two, and three of the affirmative part of defendant's answer are true.

4. That the fourth paragraph of said affirmative part of the answer is true, except the averment of value, the averment as to good faith and mistake, and the averment of "adjacency," and as to those matters it is agreed—

a. That the value of said timber at the time and under the circumstances therein stated is one and 50-100 ($1.50) dollars per thousand, instead of one dollar as alleged.

12 b. That as to the question of intent, it is agreed that defendant did not act under a mistake of fact. That is to say, defendant knew all of the facts touching the status of said timber and said lands and did what was done believing that it had the legal right so to do, such belief being based upon the advice of its counsel, an attorney of this court, to the effect that it had such right. Defendant used ordinary care and prudence in first being advised as to the law, all the facts as they herein appear relating to the status of said timber being known to said counsel, and there was no intention on the part of defendant to violate any law or to do any wrongful act.

c. Upon the issue of the "adjacency" of the lands upon which the timber in question was cut to defendant's railroad, where and in the construction of which said timber so cut was used, it is agreed that said lands from the place where said timber was used were and are the following distances, namely, from seventeen to twenty-three miles by air line; from twenty miles to twenty-five miles by wagon road, and from twenty-two to twenty-six miles following the sinuosities of the river upon which said timber was in part conveyed. By far the larger part of said timber was driven or rafted down said river from said lands to said railroad, the other part being hauled by wagon. The wagon road referred to and so used is an ordinarily good road and involves no unusual grades, and said timber could, with reasonable profit, be hauled by wagon from the place where it was cut to said railroad, where it was used for ties and in the construction of bridges.

13 It is further agreed that there were no other timber lands or suitable timber upon either side of said railroad as near as were the lands and timber in question, and that said lands are near enough and so located with reference to said railroad as to be directly and materially benefitted thereby.

5. That upon the foregoing statement of facts the following questions are to be submitted to the court for its decision:

a. What are adjacent lands within the meaning of the act of Congress of March 3d, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States?"

b. Whether said lands from which said timber was cut were adjacent to the said St. Anthony Railroad within the meaning of the said act?

c. Had the said railroad company the right under said act to take from the said public lands timber necessary for the construction of its railroad?

d. To what extent and for what amount is the said St. Anthony Railroad Company responsible for the timber cut as aforesaid, if at all?

e. To what extent and for what amount is said railroad company liable, if at all, upon the above statement of facts and under the law as it shall be decided by the court?

That judgment shall be entered by the court upon the foregoing statement of facts and upon the law as it shall decide it.

That the admissions made in this statement of facts shall bind the parties hereto only for this suit, and shall not bind them as to any other matter or case.

14 Each of the statements of fact contained in the foregoing stipulation is made subject to the objection of either party that said statement is irrelevant or immaterial.

Dated December 31, 1900.

R. V. COZIER,
Attorney for Plaintiff.
P. L. WILLIAMS,
F. S. DIETRICH,
Attorneys for Defendant.

(Endorsed:) No. 63. In the circuit court of the United States within and for the district of Idaho, southern division. United States of America, plaintiff, vs. St. Anthony Railroad Company, a corporation, defendant. Stipulation. Filed January 1, 1901. A. L. Richardson, clerk. R. V. Cozier, attorney for plaintiff. P. L. Williams and F. S. Dietrich, attorneys for defendant.

In the circuit court of the United States within and for the district of Idaho, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Judgment.

This cause having come regularly on to be heard at the city of Pocatello, Idaho, upon the 8th day of April, 1901, R. V. Cozier, esq.,
15 United States district attorney for Idaho, appearing as counsel for the plaintiff, and F. S. Dietrich, esq., as counsel for the defendant, a stipulation in writing having theretofore been entered into by said counsel for the respective parties and filed herein January 1, 1901, containing a statement of the facts involved, and wherein it was agreed that judgment should be entered by the court upon said statement of facts and upon the law; the said counsel having made their arguments to the court, and the court being fully advised in the premises and having concluded that upon said statement of facts and under the law plaintiff has no cause of action, that judgment should be entered accordingly.

It is therefore ordered, adjudged, and decreed that plaintiff take nothing by reason of the complaint herein, and that this action be and the same is hereby absolutely dismissed.

Dated this 23d day of April, 1901.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 63. United States circuit court, southern division, district of Idaho. United States of America vs. St. Anthony Railroad Company. Judgment. Filed April 23, 1901. A. L. Richardson, clerk.

In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

16 *Opinion.*

R. V. Cozier, U. S. district attorney, for plaintiff. P. L. Williams and F. S. Dietrich, for defendant.

This action is for timber taken from the pnblic domain and used in the construction of a railroad. It is submitted to the court upon a stipulation of facts, among which are: That the timber was from 17 to 23 miles by air line, from 20 to 25 miles by wagon road, over which it could be hauled with reasonable profit; and from 22 to 26 miles by river, down which the greater part was rafted; that there were no other timber lands nearer the road, and that they were near enough to it to be "directly and materially benefited thereby." The questions presented were: (1) Whether these lands were "adjacent" to a road within the meaning of the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," including the right "to take from the public lands adjacent to the line of said road material, earth, stone, and timber, necessary for the construction of said railroad," 18 St., 482; and (2) if defendant is held liable, whether it must be as an innocent or as a wilful trespasser.

The act in question has been a subject of great uncertainty, and the word "adjacent" has not yet been given any definite limits by the court of last resort. There is no guide by which to arrive at the concealed will of the lawmakers. Some of the courts have said that the conclusion in each case must be controlled by its facts. It will not profit to generally review the decisions. In that of Stone vs. United

17 States, 64 Fed., 667, and 167 U. S., 178, the trial court had instructed the jury "that adjacent lands means land in proximity and contiguous to or near to the road," which was affirmed. The timber in question there was used in the construction of the Spokane and Palouse, and the Central Washington railroads, which run through a country devoid of timber, and the timber used was the nearest to the roads, but it appears on page 673, 64 Fed., supra, that it "was cut from lands along the line of the Northern Pacific, about 50 miles distant from the eastern end of the roads," on which it was used.

On the next page the court says: "We are of opinion that, under the facts presented in this case, it could not fairly be said, under any reasonable construction of the language of the act, that the timber was taken from lands "adjacent to the line of either of the roads in the construction of which it was used." The court was certainly justified in holding that "under the facts presented" the timber was not adjacent to either of the roads on which it was used, for it was taken from lands along the line of another road. It would seem that this fact rather than the distance was, or at least could have been, the controlling question which led the court to its conclusion. At any rate, it does not determine

how far timber must be from a road to be without the boundary of adjacency. That 50 miles would be without such boundary there can be little doubt, when we consider the reasoning of all the authorities and the object of the law. That it extends beyond the mere right of way of the road can not be doubted, for thus to limit it would rob the law of its intended good. If it be confined to lands immediately contiguous
18 to the road, the question still remains, Where does contiguity end, or how far back from the contiguous line the right would extend, for to some extent it must go.

The case of Bacheldor vs. United States, 83 Fed., 986, by the eighth circuit court of appeals, is similar in its facts to those in this case. The timber cut was 21½ miles from the line of the road, or 25 miles by wagon road, and it was the nearest timber to the part of the road for which it was taken. The court held it adjacent to the road, and when so holding it had before it the Stone case, as reported in 64 Fed., supra, which it does not criticise, and it must have known of the decision of the same case by the Supreme Court, reported in 167 U. S., supra, for the latter had been decided seven months prior. Certainly this court would follow the ruling of the court of appeals of this circuit in preference to that of other appellate courts of like jurisdiction when their rulings differ. All the facts considered, the conclusion that these courts are not in conflict would seem to be fully justified; if so, it should then follow that this court should be governed by the decision of the eighth circuit court of appeals.

The additional facts in this case that the lands from which the timber was cut were within such a distance from the road as to be materially benefited by it, and that the timber was so accessible by water transportation as to make its use profitable to the road, may be additional reasons, in view of the argument of some of the cases, why in this case it should be held that the defendant had the right to its use.

It is ordered that judgment be for defendant.

BEATTY, *Judge*.

19 APRIL 22, 1901.

To the above decision the plaintiff by its counsel excepted in due form of law.

(Endorsed:) No. 63. United States circuit court, southern district of Idaho. The United States vs. St. Anthony Railroad Company. Opinion. Filed April 22, 1901. A. L. Richardson, clerk.

In the circuit court of the United States within and for the district of Idaho.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Petition for writ of error.

The plaintiffs feeling themselves aggrieved by the judgment made and entered by said court on the 23d day of April, A. D. 1901, against said plaintiffs and in favor of said defendant, comes now, by R. V. Cozier, their attorney for the district of Idaho, and petitions said court for an

order allowing these plaintiffs a writ of error from the judgment herein to the honorable United States circuit court of appeals for the ninth circuit, sitting at the city of San Francisco, State of California, according to the laws of the United States in that behalf made and provided.

R. V. COZIER,

United States attorney for Idaho and attorney for plaintiffs.

20 (Endorsed:) No. 63. In the circuit court of the United States within and for the district of Idaho. United States of America, plaintiff, vs. St. Anthony Railroad Company, defendant. Petition for writ of error. Filed July 22, 1901. A. L. Richardson, clerk. R. V. Cozier, attorney for plaintiff.

In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,
vs.
THE ST. ANTHONY RAILROAD COMPANY, DEFENDANT in error.

Assignment of errors.

In the matter of the petition of the United States of America for a writ of error.

ASSIGNMENT OF ERRORS.

Afterwards, to wit, on the day , A. D. 1901, at the October term of the United States circuit court of appeals for the ninth circuit, in the city of San Francisco, State of California, comes the United States of America, by R. V. Cozier, their attorney for the district of Idaho, and says that in the record and proceedings in the above-entitled matter there are manifest errors, in this, to wit:

21 1. That the circuit court of the United States for the district of Idaho erred in deciding, upon the stipulation and agreed statement of facts submitted, that the lands from which the timber was cut, as described and set forth in the complaint of plaintiffs in error, were adjacent to the line of the St. Anthony Railroad Company within the meaning of the act of Congress March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

2. The said circuit court erred in deciding upon the stipulation and agreed statement of facts, that the defendant in error had the right under said act of Congress to take from said public lands timber to be used in the construction and building of its railroad.

3. The said circuit court erred in deciding, upon said stipulation and agreed statement of facts, that in cutting the said timber from the said public lands the said defendant in error did not commit wilful trespass for which it was civilly liable in damages to plaintiffs in error for the full manufactured value of the timber so cut.

4. The said circuit court erred in deciding, upon said stipulation and agreed statement of facts, that the said defendant in error was not liable

to plaintiffs in error for the full amount of damages alleged and prayed in the complaint.

5. The said circuit court erred in deciding, upon said stipulation and agreed statement of facts, that the defendant in error was not liable to plaintiffs in error for any amount, or at all, for the said timber cut and removed from said public lands.

22 6. The said circuit court erred in deciding, upon said stipulation and agreed statement of facts, in favor of defendant and against plaintiff.

7. The said circuit court erred in ordering judgment to be had for said defendant in error.

Wherefore, the said plaintiffs in error pray that the decision and order of the said circuit court of the United States within and for the district of Idaho, be reversed, and that the said circuit court be ordered to enter an order that judgment be entered for the plaintiffs in error according to the prayer of their complaint.

R. V. COZIER,
Attorney for Plaintiffs in Error.

Service of the within and foregoing assignment of errors, together with a true copy thereof, accepted this day of , 1901.

Attorney for Defendant in Error.

(Endorsed:) No. 63. In the United States circuit court of appeals for the ninth circuit. United States of America, plaintiffs in error, *vs.* St. Anthony Railroad Company, defendant in error. Assignment of errors. Filed July 22, 1901. A. L. Richardson, clerk. R. V. Cozier, attorney for plaintiffs in error.

23 In the circuit court of the United States within and for the district of Idaho, southern division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Order for writ of error.

This 22d day of July, A. D. 1901, came the plaintiffs, the United States of America, by their attorney, R. V. Cozier, and filed herein and presented to this court their petition praying for the allowance of a writ of error, intended to be urged by said plaintiffs, and said defendant also having filed herein an assignment of errors as provided by law, on consideration whereof it is ordered that a writ of error to the United States circuit court of appeals for the ninth circuit from the judgment hereinbefore, to wit, on the 23d day of April, A. D. 1901, made and entered in favor of the defendant herein and against the plaintiffs herein be, and the same is hereby, allowed, and that a complete transcript of the record forthwith be transmitted to the said United States circuit court of appeals for the ninth circuit, sitting at the city of San Francisco, State of California.

Dated at Boise, this 22d day of July, A. D. 1901.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 63. In the circuit court of the United States within and for the district of Idaho. United States of America, plaintiff, vs. St. Anthony Railroad Company, defendant. Order of writ of error. Filed July 22, 1901. A. L. Richardson, Clerk.

24 *Citation.*

THE UNITED STATES OF AMERICA, ss.

To the St. Anthony Railroad Company, and to P. L. Williams and F. S. Dietrich, attorneys, greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be holden in the city of San Francisco, State of California, on the 20th day of August, A. D. 1901, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Idaho, wherein the United States of America are plaintiffs in error and you are defendant in error, to show cause, if there be any, why the judgment in said writ of error should not be canceled and speedy justice should not be done to parties in that behalf.

JAS. H. BEATTY, *Judge.*

[SEAL.] A. L. RICHARDSON, *Clerk.*

Service of the within and foregoing citation accepted, together with a true copy thereof, this 24th day of July, A. D. 1901.

P. L. WILLIAMS and
F. S. DIETRICH,
Attorneys for defendant and defendant in error.

(Endorsed:) Citation. Filed July 25th, 1901. A. L. Richardson, clerk.

25 *Writ of error.*

Writ of error from circuit court of appeals to circuit court.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judge of the circuit court of the United States for the district of Idaho, greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before you, between the United States of America, plaintiffs, and the St. Anthony Railroad Company, defendant, a manifest error has happened, to the great damage of the said plaintiffs, as is said and appears by the complaint of plaintiffs. We being willing that such error, if any hath been, should be fully corrected and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the justices of the United States circuit court of appeals for the ninth circuit, at the court room of said court in the city of San Francisco, State of California, together with this writ, so that you have the same at said place, before the justices aforesaid, on the

20th day of August, A. D. 1901, that the record and proceedings aforesaid be inspected, the said justices of the said circuit court of appeals may cause further to be done herein, to correct that error, what of right and according to law and custom of the United States ought to be done.

26 Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, affixed at Boise, in said district, this 22d day of July, A. D. 1901.

[SEAL.] A. L. RICHARDSON, *Clerk.*

The foregoing writ is hereby allowed.

JAS. H. BEATTY, *Judge.*

Service of the within and foregoing writ of error, together with a true copy thereof, accepted this 24th day of July, A. D. 1901.

P. L. WILLIAMS and
F. S. DIETRICH,
Attorneys for Defendant and Defendant in Error.

(Endorsed:) Writ of error. Filed July 25th, 1901. A. L. Richardson, clerk.

Return to writ of error.

And thereupon it is ordered by the court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States circuit court of appeals for the ninth circuit, and the same is transmitted accordingly.

[SEAL.] A. L. RICHARDSON, *Clerk.*

27 In the circuit court of the United States within and for the district of Idaho, southern division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Clerk's certificate.

I, A. L. Richardson, clerk of the circuit court of the United States in and for the district of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 28, inclusive, to be a full, true, and correct copy of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein and return to the annexed writ of error.

Witness my hand and the seal of said circuit court, affixed at Boise, Idaho, this 30th day of July, A. D. 1901.

[SEAL.] A. L. RICHARDSON, *Clerk.*

(Endorsed:) In the United States circuit court of appeals for the ninth circuit. The United States of America, plaintiffs in error, *vs.* The St. Anthony Railroad Company. Error to the United States circuit court for the district of Idaho, southern division. Transcript of record. Filed August 2, 1901. F. D. Monckton, clerk.

28 *Proceedings in U. S. circuit court of appeals for the ninth circuit.*

29 In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE ST. ANTHONY RAILROAD COMPANY, DEFENDANT in error.
No. 731.

Error to the United States circuit court for the district of Idaho, southern division.

This is an action to recover from the defendant in error the value of timber cut by it upon the public lands of the United States in Idaho, for use in the construction of the railroad of the defendant in error. After the filing of complaint and answer, the case was submitted to the lower court upon an agreed statement of facts, substantially as follows:

The plaintiff in error was the owner and in possession of the lands described in the complaint. During the summer and fall of the year 1889 the defendant in error, an Idaho corporation, entered upon the said lands, and through its agents and representatives cut and removed therefrom 1,682,975 feet of timber of the manufactured value of $12.35 per thousand feet and of a stumpage value of $1.50 per thousand feet, and used the same in the construction of its railroad between Idaho Falls, in Bingham County, and St. Anthony, in Fremont County, State of Idaho, a distance of approximately forty miles. Said railroad passed through public lands of the United States, and the defendant in error had
30 duly complied with all the requirements of the act of March 3, 1875, granting to railroad companies the right of way through the public land of the United States, and became entitled to the benefits and privileges therein granted to railroad companies. The timber was cut at a distance from the road of 17 to 23 miles by air line, from 20 to 25 miles by wagon road, and from 22 to 26 miles following the windings of the river, down which much of the timber was rafted. The remaining portion was hauled by wagon, the road being a good one, with no unusual grades, and the timber could be hauled by wagon to the place where it was used with reasonable profit. There was no other suitable timber-bearing land upon either side of the line of the railroad as near as were the lands in question, and said lands were so situated with reference to said railroad as to be benefited thereby.

It is admitted that the defendant in error in going upon said lands and cutting and removing timber therefrom did not act under a mistake of fact, but believed that it had the right to do so, using ordinary care and prudence and acting under the advice of its counsel.

Upon the questions involved in this statement of facts the court below rendered its decision in favor of the defendant railroad company, and the plaintiff sued out a writ of error thereupon to this court.

R. V. Cozier, U. S. attorney, for plaintiff in error.
P. L. Williams and F. S. Dietrich, attorneys for defendant in error.
Before Gilbert, Ross, and Morrow, circuit judges.

MORROW, circuit judge, delivered the opinion of the court:

31 The assignments of error present this question: Were the lands from which the timber was cut by the defendant in error "adjacent" to the line of its railroad, within the meaning of the act of March 3, 1875?

Section 1 of the said act provides:

"The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and the proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public land adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of its said railroad." (18 Stats., 482.)

It is contended by the plaintiff in error that the word "adjacent" in this section should be construed to mean "in proximity to," "contiguous," or "near" the line of the railroad, and that the distance of 17 to 26 miles cannot reasonably come within such a definition. The section has been variously construed by the trial courts, but not definitely passed upon by the court of last resort. In United States v. Denver & R. G. Ry., 31 Fed., 886, the court construed the language of the act as intending to indicate such timber and other materials as could be conveniently reached by ordinary transportation by wagons. In United States vs. Chaplin, 31 Fed., 890, land was declared to be "adjacent" within the purpose and intent of the act, when by reason of its proximity thereto it is directly and materially benefited by the construction of the railroad. And in United States v. Lynde, 47 Fed., 297, 300, the court expressed the opinion that just what should be considered adjacent land must be determined by the evidence in each particular case. The latter view has met with the approval of this court, as indicated by the opinion of Judge Hawley in Stone v. United States, 29 U. S. App., 32; 64 Fed., 667. No exact definition was there attempted, the court merely holding that "under the facts presented" a reasonable construction of the language of the act
32 would not permit the timber land in question to be deemed adjacent to the line of railroad of the defendant company. This decision was affirmed by the Supreme Court of the United States (Stone v. United States, 167 U. S., 178, 191) without further determining the boundary of adjacency contemplated by the act of Congress. The court concurred with the view expressed in Denver & R. G. Ry. v. United States, 34 Fed., 838, 841, that Congress did not intend to grant anything like a general right to take timber from land where it was most convenient, but other than this expression did not attempt to interpret the language of the act, and left the decision dependent upon the particular facts presented.

It is well settled that, while public grants are to be construed strictly against the grantees, they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. And to ascertain that intent it is often necessary to look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of

them together. Winona & St. Peter R. R. v. Barney, 113 U. S., 616, 625. In United States v. Denver, &c., R. R., 150 U. S., 1, 15, this rule of construction was held to be properly applicable to the act of 1875 in controversy in the present action. In that case the timber was cut from lands adjacent to the line of railroad of the defendant, but was used in the construction of its road at points distant from the place at which it was taken. Under the rule of construction above stated, it was held to be the purpose of Congress to aid railroad companies, entitled to the benefits of the act, by conferring the right to take timber necessary for road construction from adjacent public lands and use it upon distant portions of their lines.

33 Applying, then, this liberal construction of the act to the facts before us, we are entitled to consider that the road under construction passed through a barren, frontier country; that according to the admitted facts there was no suitable timber upon either side of the said road nearer than the lands in question, and that said lands from which the timber was cut were near enough and so located with reference to said road as to be directly and materially benefited thereby; that said timber could be hauled by wagon to said railroad with reasonable profit. These conditions are important in considering whether the privilege conferred by Congress has been properly exercised, and whether the mutual benefits contemplated by the act are likely to be realized.

The case of Bacheldor v. United States, 83 Fed., 986, presented a similar state of facts to the one at bar. Bacheldor, acting for the Denver & Rio Grande Ry. Co., had cut timber from Government land some 25 miles distant by wagon road from the line of railroad, in the construction of which it was to be used. No suitable timber could be found nearer. The trial court instructed the jury that the word "adjacent," as used in the act of Congress authorizing the cutting of timber for railroad construction, meant the tier of townships lying adjoining on either side of the townships upon or through which the line and right of way of the proposed railroad passed. The supreme court of the Territory of New Mexico affirmed the conviction of Bacheldor, but the judgments of both courts were reversed by the circuit court of appeals for the Eighth circuit, Judge Thayer, speaking for the court, declaring that no court can say, as a matter of law, that a trespass was committed because timber was taken from a place 25 miles distant by wagon road from the right of way of the railroad; but it should be left to a jury of the vicinage to determine, under proper instructions from the court, whether the right accorded by the statute was fairly exercised as Congress intended it should be. The fact that Congress did not in definite terms limit the right to take timber and

34 other materials to adjoining townships, but used the word "adjacent," a purely relative term, which may be understood differently when applied to different objects or under different circumstances, was there considered very persuasive evidence that Congress did not intend to fix an arbitrary line beyond which the right to take timber and other materials should not extend, but that its purpose was to leave such right to be governed by circumstances. It was further said:

"Congress intended to offer substantial inducements for the construction of railroads in certain sections of the country where timber suitable

for railroad construction was known to be scarce, and in many places distant from the lines of road to be benefited, as they would be projected and built. For that reason it did not establish a fixed line on either side of the right of way, which, if established, would at times render the privilege of taking material valueless; but it chose to confer the privilege in such terms as would allow the land department, and courts and juries as well, some discretion in determining, under different conditions, what was a proper limit within which it might be exercised. It accordingly authorized timber and other materials to be taken from adjacent lands, leaving those wh[illegible] duty it would be to see that the right was not abused, but was exercised in a reasonable manner, to decide in any given case whether the land from which material had been obtained was adjacent to the right of way within the spirit and intent of the act."

We are in accord with this construction of the act. And while under some circumstances the cutting of timber from public lands at a distance of from 17 to 26 miles from the line of railroad under construction would undoubtedly be deemed a trespass, as without the meaning of the word "adjacent" in said act, the circumstances of the present case do not warrant such a holding. No injury appears to have been suffered by the plaintiff in error by reason of the act of the defendant in error; on the contrary, the land from which the timber was cut is admittedly benefited by the construction of the railroad, and, under all the conditions existing, it should be considered to be "adjacent" to the line of railroad constructed by the defendant in error, as contemplated by the act of 1875.

The judgment of the circuit court is affirmed.

(Endorsed:) Opinion. Filed Mar. 3, 1902. F. D. Monckton, clerk.

35 United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error, v. THE ST. ANTHONY RAILROAD CO., DEFENDANT in error. } No. 731.

Judgment.

In error to the circuit court of the United States for the district of Idaho, southern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Idaho, southern division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Judgment. Filed and entered Mar. 3, 1902. F. D. Monckton, clerk.

36 In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
THE ST. ANTHONY RAILROAD COMPANY, DEFENDANT in error.

Petition for writ of error.

The United States of America, plaintiff in error herein, feeling itself aggrieved by the judgment made and entered by the United States circuit court of appeals for the ninth circuit on the 3rd day of March, 1902, wherein the United States of America was plaintiff in error and the St. Anthony Railroad Company was defendant in error, and wherein said United States circuit court of appeals affirmed the judgment of the United States circuit court for the district of Idaho, made and entered on the 22nd day of April, 1901, against the plaintiff in error and in favor of the defendant in error, comes now by P. C. Knox, Attorney-General of the United States, and R. V. Cozier, United States attorney for the district of Idaho, and petitions said court for an order allowing said plaintiff in error to prosecute a writ of error to the honorable the Supreme Court of the United States according to the law of the United States in that behalf made and provided.

A certified copy of the entire record of the said case in the said circuit court of appeals is herewith furnished as part of this application and the same is marked "Exhibit A."

P. C. KNOX,
Attorney-General of the United States.
R. V. COZIER,
U. S. Attorney, District of Idaho, Attorneys for Plaintiff in Error.

37 (Endorsed:) Petition for writ of error. Filed September 10th, 1902. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

38 In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE ST. ANTHONY RAILROAD COMPANY, DEfendant in error.

Assignment of errors.

Comes now the plaintiff in error, by its counsel, and submits the following assignments of error upon which it relies to reverse the judgment of the United States circuit court of appeals for the ninth circuit in the above-entitled cause:

1st. Said circuit court of appeals erred in its decision, filed March 3, 1902, that, upon the stipulation and agreed statement of facts filed in the United States circuit court for the district of Idaho, as shown by the record herein, the public lands of the United States from which the timber

in dispute was cut and removed, as described and set forth in the complaint of the plaintiff in error, were adjacent to the railroad line of the defendant in error within the meaning of the act of Congress of March 3, 1875, entitled "An act granting railroads the right of way through the public lands of the United States."

2nd. Said circuit court of appeals erred in deciding, upon the said stipulation and agreed statement of facts, that the defendant in error had the right, under said act of Congress, to take from said public lands the timber to be used in the construction and building of its railroad.

3rd. Said circuit court of appeals erred in deciding, upon the said stipulation and agreed statement of facts, that in the cutting and removal of said timber from said public lands the defendant in error did not commit willful trespass, for which it was civilly liable to plain-
39 tiff in error for the full manufactured value of the timber so cut and removed.

4th. Said circuit court of appeals erred in deciding, upon said stipulation and agreed statement of facts, that defendant in error was not liable to plaintiff in error for the full amount of damages as alleged and prayed for in the complaint of plaintiff in error, or for any amount, or at all.

5th. Said circuit court of appeals erred in deciding, upon said stipu- and agreed statement of facts, in favor of defendant in error and against plaintiff in error.

6th. Said circuit court of appeals erred in affirming the judgment of the said circuit court of the United States for the district of Idaho.

7th. Said circuit court of appeals erred in not reversing the judgment of the said circuit court of the United States for the district of Idaho, and directing it to enter a judgment in favor of plaintiff in error and against defendant in error.

Respectfully submitted.

P. C. KNOX,
Attorney-General of the United States.

R. V. COZIER,
U. S. Attorney for the District of Idaho,
for Plaintiff in Error.

(Endorsed:) Assignment of errors. Filed September 10th, 1902. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

40 United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
v.
THE ST. ANTHONY RAILROAD COMPANY, DEFENDANT in error.
No. 731.

Certificate to Clerk C. C. A. to transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing thirty-nine (39) pages, numbered from one (1) to thirty-nine (39), inclusive, to be a true copy of the record and of the assignment of errors, and of all proceedings in the above-entitled case, including the opinion filed, as the

same remain of record in my office, and that the same, together, constitute the return to the annexed writ of error.

Attest my hand and the seal of the said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 12th day of September, A. D. 1902.

[SEAL.]

F. D. MONCKTON, *Clerk*,
By MEREDITH SAWYER,
Deputy Clerk.

41 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the U. S. circuit court of appeals for the ninth circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said U. S. circuit court of appeals before you, or some of you, between The United States of America, plaintiff in error, and The St. Anthony Railroad Company, defendants in error, a manifest error hath happened, to the great damage of the said the United States, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of August, in the year of our Lord one thousand nine hundred and two.

[SEAL.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

JOSEPH MCKENNA,
Associate Justice of the Supreme Court of the United States.

42 *Return of writ of error.*

The answer of the judges of the United States circuit court of appeals for the ninth circuit:

As within we are commanded, we certify under the seal of our circuit court of appeals in a certain schedule to this writ annexed the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within-named defendant in error.

By the court:

[SEAL.]

F. D. MONCKTON, *Clerk.*
By MEREDITH SAWYER,
Deputy Clerk.

(Indorsed:) No. 731. United States circuit court of appeals for the ninth circuit. The United States of America, plaintiff in error, vs. The St. Anthony Railroad Company, defendant in error. Original writ of error. Filed September 10th, 1902. F. D. Monckton, clerk. By Meredith Sawyer, deputy clerk.

43 UNITED STATES OF AMERICA, *ss:*

To The St. Anthony Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of appeals for the ninth circuit, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph McKenna, associate justice of the Supreme Court of the United States, this 19th day of August, in the year of our Lord one thousand nine hundred and two.

JOSEPH MCKENNA,
Associate Justice of the Supreme Court of the United States.

44 Received a true and correct copy of the within citation at Pocatello, Idaho, this 27th day of August, 1902.

P. L. WILLIAMS,
T. S. DURANT,
Attorneys for Defendant in Error.

45 OREGON SHORT LINE RAILROAD COMPANY,
LAW DEPARTMENT,
Pocatello, Idaho, August 27, 1902.

Mr. R. V. COZIER,
U. S. Attorney, Moscow, Idaho.

DEAR SIR: Herewith I hand you original citation with acknowledgement of service in the timber-cutting case. Personally I would have no objection to signing the acknowledgment of service in the form in which you had it, but Mr. Williams now has control of this, and I do not know just what the status of the case is, and I have therefore thought it best to simply acknowledge the fact of service. In all probability it makes no difference.

Yours, truly, F. S. DIETRICH, *Assistant Attorney.*
Encl.

46 (Indorsed:) No. 731. United States circuit court of appeals for the ninth circuit. The United States of America, plaintiff in error, vs. The St. Anthony Railroad Company, defendant in error. Original citation. Filed Sep. 10, 1902. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

(Indorsement on cover:) File No. 18707. U. S. C. C. of appeals, 9th circuit. Term No. 479. The United States, plaintiff in error, vs. The St. Anthony Railroad Company. Filed October 22d, 1902.

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